IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1134

HARRY ROADEN, ----------PETITIONER

versus

COMMONWEALTH OF KENTUCKY, ----------RESPONDENT

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled "Harry Roaden v. Commonwealth of Kentucky" and is reported at 473 S.W.2d 814 (1971).

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C., Sect. 1257(3).

QUESTION PRESENTED

IN THE ABSENCE OF A PRIOR ADVERSARY HEARING, IS THE SEIZURE, INCIDENT TO AN ARREST, OF ALLEGEDLY OBSCENE MATERIAL A VIOLATION OF DUE PROCESS OF LAW?

STATEMENT OF THE CASE

Petitioner is appealing a decision of the Kentucky Court of Appeals which affirmed a judgment of the Pulaski Circuit Court which, after trial by jury, found the Petitioner guilty of violation of Kentucky Revised Statutes Chapter 436, Section 101, and set the punishment at $1,000 fine and six months in jail.

This prosecution involved the Kentucky obscenity statute (KRS 436.101), and the showing of an obscene motion picture, entitled "Cindy and Donna." On September 29, 1970, the Sheriff of Pulaski County and the Prosecuting Attorney for that district purchased tickets to the Highway Drive-In Theater, which is located in Pulaski County. (A-8, 9, 10; 16, 17) The Sheriff viewed the entire film and proceeded to the projection booth, where he arrested Petitioner on the charge of exhibiting an "obscene" film to the general public. (A-9, 10, 11) As part of the arrest the Sheriff seized the film (A-10, 11; A-12, 13), and during the trial the Court overruled a motion by Petitioner to suppress the film as evidence on the ground that it was illegally seized, and admitted the film into evidence. (A-6, 7; and A-8) It should be pointed out that although Petitioner moved to suppress the film as evidence, he did not move the Court for a return of the film. During the course of the trial, the jury was permitted over Petitioner's objection to view the evidence. (A-21, 22; A-25, 26)

As noted by the Kentucky Court of Appeals in its decision in this case (473 S.W.2d 814 at 815):

> "It was conceded by Roaden's counsel in closing argument to the jury that the film is obscene. No issue is presented on the appeal as to the obscenity of the material."

SUMMARY OF ARGUMENT

It is a well-settled principle of law that, generally, evidence seized incidental to a lawful arrest can be used in a criminal prosecution. Petitioner argues that *Marcus v. Search Warrants*,

367 U.S. 717 (1961) and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) require that a prior adversary hearing be held before there is a seizure of obscene material. Both *Marcus* and *Quantity* can be distinguished from the present case, since in both of those instances large quantities of printed material were seized for the purpose of destruction, whereas in the present case one copy of a film was seized incidental to a lawful arrest for admission into evidence.

There is no showing of a pattern of harassment by officials of the Commonwealth concerning Petitioner, and Petitioner at no time asked for a return of the film that was seized so that he might later continue to show it at his theater. It could therefore be assumed that Petitioner's concern is not so much for his First Amendment rights to freedom of speech, but rather he is more concerned that the evidence which was seized was used against him in the criminal prosecution. The framers of the Constitution did not anticipate the Constitution being used as a means of thwarting legitimate prosecutions and this Court should not construe the Constitution in such a manner so as to frustrate legitimate prosecutions. It should be pointed out that counsel for Petitioner admitted in closing argument that the film was obscene and that therefore there is no real question concerning First Amendment rights, since an admittedly obscene film does not fall within the right to freedom of speech, *Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

If this Court were to decide that a prior adversary hearing is necessary prior to seizure of obscene films, such a decision would have the practical effect of eliminating or severely restricting criminal prosecutions for the showing of obscene films. It is a well-recognized fact that films can be altered and changed, and that they are usually transported from one area to another for showing with rapid regularity. Since this Court has stated that the test for obscenity is, taking the material as a whole, determining that it appeals to the prurient interest and that it

is utterly without redeeming social value, it is obvious that a copy of the film shown at the commission of the crime is absolutely necessary for prosecution under obscenity statutes. Requirement of a prior adversary hearing is unworkable and would create an unbalanced state of affairs which would promote a disrespect for law and order, since the public might observe individuals openly displaying obscenity while enforcement officers are unable to take quick, effective action.

There is no showing in the present case that the Commonwealth of Kentucky acted in bad faith, but rather the evidence shows that extreme care was taken to insure Petitioner of a speedy review and that within hours after the arrest and seizure, the Grand Jury after reviewing the evidence returned an indictment. It should also be pointed out that in this instance the Commonwealth Attorney, who is that district's chief prosecuting attorney, was present with the Sheriff and would have had the opportunity to advise him of probable cause at the time of the seizure. The Commonwealth therefore exhibited its intent to prosecute an obscene film and the action of the Sheriff and the Commonwealth of Kentucky is in keeping with the rights of the Petitioner as granted by the Constitution, while at the same time protecting the people of Kentucky from obscenity.

It is therefore respectfully requested that the decision of the Kentucky Court of Appeals in this matter be upheld.

ARGUMENT

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE SEIZURE OF THE OBSCENE FILM INCIDENTAL TO A LAWFUL ARREST AND THE ADMISSION OF THE FILM INTO EVIDENCE.

A. The Film Was Seized For Use As Evidence

Petitioner made the motion to suppress the evidence and dismiss the indictment because he contended that the evidence

was unlawfully seized. This motion was properly overruled. Petitioner's main reliance is upon the U. S. Supreme Court cases of *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (1961), and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964). Both of these cases can be distinguished from the present factual situation, since in both instances peace officers in those cases seized large quantities of books pursuant to state statutes which permitted the seizure of allegedly obscene publications and their later destruction. This Court held that the seizure of this large quantity of material was unlawful, absent a prior adversary hearing. In the present case, one copy of a film was seized incidental to a lawful arrest for a crime which was committed in the officer's presence.

The Court in *Bazzell v. Gibbens*, 306 F.Supp. 1057, 1059, (E.D. La. 1959), in which a motion picture film was seized with a warrant coincidental to a lawful arrest, reasoned clearly when it stated:

> ". . . We have for decision only the narrow question of whether or not the Constitution of the United States compels, in all cases, an adversary hearing on the question of obscenity prior to seizure of the thing alleged by the State to be obscene. We answer that question in the negative . . . ."
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>
> I find nothing in the case law to indicate that in every case where seizure of alleged obscene material is to be made, a preseizure adversary hearing is constitutionally required. Whether or not such a hearing is required must depend upon the nature and purpose of the seizure. If the seizure is made for the purpose of destroying the thing seized and for the purpose of preventing the dissemination of the material involved, then *A Quantity of Books* teaches that an adversary hearing prior to the seizures and/or destruction of the material is required in order not to fun (sic) afoul of the First Amendment guarantee to the right of freedom of ex-

pression. But where, as here, a single copy of a film is seized for the sole purpose of preserving it as evidence to be used in a criminal action to be brought pursuant to a State statute . . . such a seizure cannot be said to be violative of the First Amendment's guarantees albeit a side effect of such a seizure coincidentally prevents that one particular copy of the film from being further disseminated pending the outcome of the criminal proceedings . . . .

• • • •

. . . [T]he purpose of the possession of the film by the State is to preserve the minimum amount of evidence required to properly prepare the State's case rather than to prohibit the further dissemination of the information contained in the film prior to trial . . . ."

See also *Scott v. Frey*, 330 F.Supp 365 (1971))

The First Amendment to the United States Constitution protects freedom of speech in this country. The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Both of these freedoms must be jealously guarded. Neither of these freedoms, however, should be used as a means of frustrating legitimate prosecutions and the protection of the general public. Both *A Quantity of Books* and the *Marcus* cases point out the evil inherent in the wholesale seizure of publications which are alleged to be obscene. In such cases, the possibility exists that legitimate publications might be seized and destroyed as a means of oppressing dissident views. The same reasoning would hold true for the wholesale seizure of motion picture films. In the present case, however, Petitioner has not complained that his right to freedom of expression has been interfered with by the seizure of a film which is not obscene, but rather complains that an obscene film which was seized as an incident to an arrest was admitted into evidence. At no time during the proceedings does the record show that petitioner moved for a return of the evidence so that he might continue to show it at the motion picture theater.

Therefore, it may be assumed that Petitioner is not so concerned about his First Amendment rights as he is about avoiding prosecution for his crime.

As noted by the Second Circuit Court of Appeals in *U. S. v. Cangiano*, ---------- F.2d ----------, decided June 26, 1972, in which there was a seizure of allegedly obscene material incidental to an arrest,

> ". . . [E]ven assuming that there was an undue infringement of First Amendment rights, we reject appellant's contention that this infringement required the suppression of the material seized at the subsequent obscenity prosecution . . . .
>
> . . . However, where seizure of allegedly obscene materials is not preceded by a procedure which affords a reasonable likelihood that non-obscene materials will reach the public, the proper remedy is the return of the allegedly obscene materials to those from whom they were seized, not suppression of these items at a subsequent obscenity trial . . . ."

The Court in *Cangiano* noted in a footnote that at no time had the appellants requested the return of the material seized and even if they had it would have been permissible for the government to retain a few samples of the material for use as evidence. (See also *State v. Albini*, 31 Ohio St.2d 27, (decided July 5, 1972)).

The motion by Petitioner appears to have been solely for the purpose of suppressing introduction of the movie into evidence. While the rule which prohibits introduction into evidence of material illegally seized is an important guarantee provided by the Fourth Amendment, its purpose is to provide a sanctuary for an individual in his home or habitat. The theory which is the basis for this rule is not present in the instant case in which the evidence was seized within the immediate proximity of the party being arrested in a drive-in theater movie projection booth. (See *Johnson v. Commonwealth*, Ky., 475 S.W.2d 893 (1971)).

The case of *Lee Arts Theater v. Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968), which was cited by Petitioner, is likewise unpersuasive. In the *Lee Arts* case, a film was seized pursuant to a warrant issued solely upon the conclusory affidavit of a police officer, which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard that the films were obscene. We read the *Lee Arts* case to stand for the principle that the procedure for obtaining a search warrant in that case was defective and not for the proposition that evidence obtained incident to a lawful arrest cannot be admitted into evidence.

Adoption by this Court of a rule which would require a prior adversary hearing before an arrest and the seizure of an obscene film would have the practical effect of opening the door to the showing of hard-core pornography in a theater, while peace officers stand helplessly by awaiting a court ruling. We do not believe that this Court had this in mind in either the *Marcus, Quantity of Books* or *Lee Arts* cases .The better rule is that where a peace officer has viewed the film and has reason to believe that it is obscene, makes an arrest, and seizes the evidence coincidentally with the arrest, such material should be admitted into evidence absent a showing that the action of the officer was part of a pattern of harassment or an abridgement of the right of free speech.

In the present case, the obscenity of the movie was not questioned. There is no showing that Petitioner moved for a return of the film so that he could continue to have it shown in his theater. Obscenity is not protected under the constitutional right to freedom of speech of the First Amendment (*Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)). The seizure of the obscene film was incidental to a lawful arrest. The Constitution of the United States should not be used as an excuse to avoid conviction for the showing of an admittedly obscene film.

B. Requiring an Adversary Hearing Prior to Seizure of Obscene Films Would Have the Practical Effect of Severely Restricting or Eliminating Such Criminal Prosecutions for the Showing of Obscene Films.

This Court has stated in *Roth v. U.S., supra,* that obscenity is not protected under the constitutional right to freedom of speech and has therefore indicated its approval of criminal prosecutions in obscenity cases. (See also *U.S. v. Reidel,* 402 U.S. 351 (1971)). Petitioner would argue that, while obscenity is not protected by the First Amendment to the Constitution, this Court should place in the way of prosecutors insurmountable roadblocks which would have the practical effect of stopping enforcement of laws prohibiting obscenity which this Court has indicated is within the reasonable powers of the state to enforce.

Although this Court has recognized the difference between obscene books and obscene films in the *Lee Arts* case, supra, the full import and practical effect of these differences has not been explored fully. It is well known that films are moved from theater to theater with rapid regularity, whereas printed material often stays on the shelves of the bookstore for an appreciable period of time. Because of the fugitive nature of films as opposed to books, this Court should state the rule that, when a peace officer has viewed a film and determined its obscenity, the film can be admitted into evidence if it was seized incidental to the lawful arrest. Although apparently vacated for other grounds by this Court (401 U.S. 987), the reasoning of the U.S. District Court for the Southern District of Mississippi in *Hosey v. the City of Jackson,* Miss., 309 F.Supp. 527 (1970) seems applicable here. There, a film was seized incidental to a lawful arrest and the arrest and seizure were not made pursuant to any warrant. The Court stated at page 534:

> "The film itself is unquestionably the best evidence in any criminal prosecution for the public showing of an obscene movie. More importantly, however, it is a well-known fact that moving picture films may be and often

> are altered by adding or deleting one or more scenes for showing at a particular theater or exhibition. The absolute necessity of retaining an exact content of the film as shown at the time of the commission of the alleged offense is obvious . . . ."

The Court also pointed out in that case that if a prior adversary hearing were required before seizure of the film could be made, the film might easily be shipped to another location before the arrest could be effectuated. The Court considered that:

> ". . . [A] procedure which is not unreasonable and not oppressive should not be contained so as to completely frustrate a state's legitimate right to prohibit a public showing of obscene movies."

Adoption of a rule concerning prior adversary hearing as suggested by Petitioner would place peace officers, local law enforcement officials, and prosecutors in the untenable position of trying to enforce laws which the Supreme Court has indicated are lawful, with their hands tied as a result of a Supreme Court decision making enforcement a practical impossibility. Such an unbalanced state of affairs would promote a disrespect for law and order—since the public would observe individuals openly displaying obscenity while police officers and prosecutors stand by in frustration.

A rule requiring a prior adversary hearing before seizure of obscene material would also place the courts in the ridiculous position of advising on whether there is probable cause to prosecute for obscenity and then deciding the ultimate issue. Such a rule would provide the courts of the Commonwealth and other states with a procedural nightmare. The dignity of the judiciary should be above such requirements.

C. The Commonwealth of Kentucky Did Not Act in Bad Faith in the Procedures Used for Arrest and Seizure in Connection With the Showing of the Obscene Film.

As noted in the statement of the case, the Commonwealth Attorney, who is the chief prosecuting attorney for that district in Kentucky, accompanied the Sheriff to the theater. He therefore had the opportunity of advising the Sheriff on whether in his estimation there was probable cause to believe that an obscene motion picture was being shown to the public in the Sheriff's presence. The Court might well be concerned with the possibility of harassment of a theater owner by a peace officer for personal interest, and of arresting and seizing film when there is no possibility or probability of a successful prosecution. In the present case, however, the Commonwealth Attorney accompanied the Sheriff and in fact did prosecute the case expeditiously.

It should also be pointed out that the arrest and seizure of the film took place on September 29, 1970 (A. 9). The Grand Jury in Pulaski County issued an indictment on September 30, 1970 (A 4). Although a failure to indict by a grand jury would not have assured Petitioner of his release or the release of his film, it is quite apparent that the Commonwealth of Kentucky used every means at its disposal to insure a speedy review by a grand jury of the action taken by the Sheriff and the prosecuting attorney on the night before. It can be presumed that the Grand Jury, after reviewing evidence, determined that there was probable cause by which to issue the indictment within *hours* after the arrest and seizure of the material. (See *U.S. v. Thirty-seven Photographs*, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 1971)). It is therefore obvious that the seizure of the material by the Sheriff of Pulaski County was not taken lightly, nor was the right to freedom of speech of the Petitioner handled in such a manner as to harass him or to deprive him of his right of expression.

CONCLUSION

The Court's concern on this subject and its decision to review and make a determination on the issue of the seizure of obscene material incidental to a lawful arrest is understandable.

In light of the confusion experienced by prosecutors, law enforcement officials, as well as theater operators resulting from what has been interpreted by some as a rule requiring a prior adversary hearing before an arrest and the seizure of obscene material, it is understandable why this Court has chosen to review this issue and settle the question once and for all. It is respectfully suggested to this Court that what is needed is a fresh approach to this entire problem. The rule should be firmly established by this Court that the test in seizure of obscene motion pictures should be that a peace officer may seize such film if such seizure is for the purpose of introduction into evidence as opposed to seizure for the purpose of suppression of ideas. In those instances where seizure is made, First Amendment rights would then require that if the theater owner had a second copy of the film available, he might then immediately begin showing the film again without interruption or interference by the arresting officers.

A film must obviously be introduced into evidence, since in *Roth v. U. S., supra,* this Court stated that the alleged obscenity must be taken as a whole to determine whether it appeals to prurient interest. The prosecution must also show that the film offends contemporary community standards. This cannot adequately be done without the jury's viewing the entire film. There is no way of viewing the film as a whole to decide whether it appeals to prurient interest or has redeeming social value by oral statements of witnesses describing segments; therefore the entire film should be viewed by the jury for determination of obscenity and it must be seized quickly before it is altered or transported elsewhere.

The fallacy in the seizure argument by Petitioners is that they assume that when a film is seized there will be only one copy available and that the public will be thereby prohibited from viewing the film. If the theater owner wants to ensure an uninterrupted showing of the film, and if he realizes that the film in question is borderline and might result in an obscenity

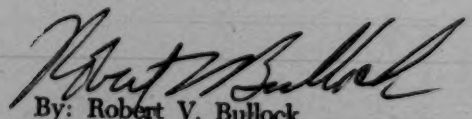
arrest, it is not too great a burden to require him to keep on hand a second copy of the film in the event of an arrest and seizure, and this cost can be assumed as a cost of doing such business. Should it be necessary, a theater owner could resort to the courts to resolve civilly any dispute where a film is needed for immediate showing. A balancing of the equities between freedom of speech on the one hand and protection of the public from obscenity on the other requires that any additional burden such as maintaining a second copy of the film be borne by the theater owners.

It should be emphasized once again, as it was noted by the Kentucky Court of Appeals in its legally and factually correct opinion, that it was conceded by Roaden's counsel in closing argument to the jury that the film is obscene. The only question then left to this Court to decide is whether, when an officer makes a lawful arrest and seizes an obscene film, that film can be admitted into evidence so that the jury might have the benefit of the best evidence available. It is respectfully urged by the Commonwealth that such evidence should and must be admitted by the Court.

For the reasons stated above, it is respectfully urged that the decision of the Kentucky Court of Appeals in this matter should be affirmed.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL



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PROOF OF SERVICE

I, Robert V. Bullock, one of the counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 2nd day of August, 1972, I served three copies of the Brief for Respondent on Phillip K. Wicker, 120 North Main Street, Somerset, Kentucky 42501, Attorney for Petitioner, by mailing the copies in a duly addressed envelope with first class postage prepaid, to said attorney at the above address. I further certify that all parties required to be served have been served.

Robert V. Bullock
Assistant Attorney General